IN THE

Supreme Court of the United States

October Term, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN, FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and HELEN L. BUTTENWIESER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of Health, Education and Welfare of the United States, and HAROLD HOWE, 2d, as Commissioner of Education of the United States,

Appellees.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL COUNCIL OF CHURCHES *AMICUS CURIAE* IN SUPPORT OF JURISDICTIONAL STATEMENT

NORMAN DORSEN
New York University School of Law
40 Washington Square South
New York, New York 10003
Attorney for Amicus Curiae

Of Counsel:
CHARLES H. TUTTLE
One Chase Manhattan Plaza
New York, New York 10005

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The National Council of Churches of Christ in the U.S.A., for the reasons stated below under Interest of the *Amicus Curiae*, respectfully moves this Court for permission to file a brief *amicus curiae* in support of the Jurisdictional Statement in this case. Counsel for the Appellant

has consented to the filing of this brief, but counsel for the Appellee has denied consent. While the movant is aware that the Court does not favor motions for leave to file briefs *amicus curiae* at this stage, the special considerations present in this instance have led the movant to seek to file the accompanying brief.

NORMAN DORSEN
New York University School of Law
40 Washington Square South
New York, New York 10003
Attorney for Amicus Curiae

Of Counsel:
CHARLES H. TUTTLE
One Chase Manhattan Plaza
New York, New York 10005

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BRIEF OF THE NATIONAL COUNCIL OF CHURCHES *AMICUS CURIAE* IN SUPPORT OF JURISDICTIONAL STATEMENT

Interest of the *Amicus Curiae*

The National Council of Churches of Christ in the U.S.A. is a membership corporation under the laws of the State of New York, composed of thirty-four Protestant and Orthodox religious denominations, which themselves

have an aggregate membership of approximately 42,500,000 throughout the United States. It is governed by a representative General Board whose 255 members are selected by the several denominations according to their respective procedures.

The General Board meets three times a year to determine the policies under which the National Council of Churches operates. In 1954 and 1961, the General Board adopted policy statements advocating federal aid to public schools only. Testimony was given before committees of both houses of Congress supporting the legislation for federal aid to education proposed by President Kennedy, which failed of enactment mainly because of a dispute over church-state issues.

When a new solution to the church-state issue was proposed by President Johnson early in 1965, the National Council of Churches scrutinized it carefully, and in a resolution adopted February 26, 1965, found it potentially acceptable. The resolution discussed the "child-benefit" concept on which the church-state solution in the President's education bill was based, and suggested certain limitations which the General Board felt should apply to that concept:

> "In any program of federal aid that makes benefits available to children in non-public schools, certain safeguards should be designed to make clear that it is *children* and not *schools* which receive the benefit, *viz.*:
>
> 1. That benefits intended for all children be determined and administered directly by public agencies responsible to the electorate * * *;

> 2. That such benefits * * * not be conveyed in such a way that religious institutions acquire property or the services of [teaching] personnel thereby;
>
> 3. That such benefits not be used directly or indirectly for the inculcation of religion or the teaching of sectarian doctrine; and
>
> 4. That there be no discrimination by race, religion, class or national origin in the distribution of such benefits.
>
> Since these distinctions are subtle, and the principles at stake important, adequate provision for judicial review should be included in any legislation on this subject.

Testimony to this effect was given to the House Subcommittee considering the legislation by Dr. Arthur Flemming, now President, and then First Vice President of the National Council of Churches, and former Secretary of Health, Education and Welfare. This testimony was instrumental in obtaining certain revisions which required public ownership and control of all benefits afforded children attending non-public schools.

When Dr. Flemming subsequently testified before the Senate Education Subcommittee, he was asked if he had seen the House Committee's revisions and if he was satisfied with them. He answered affirmatively. This exchange was cited in the House debate on the bill by Rep. Carl Perkins, Chairman of the House Subcommittee (*Congressional Record,* March 24, 1965, p. 5562).

The strategy of the supporters of the bill in both House and Senate was to resist all amendments, lest the bill suffer

the fate which had befallen earlier aid-to-education bills. The amendment which seemed most likely to break through this strategy and which would, if adopted, have alienated a major bloc of the bill's supporters (advocates of assistance to children in non-public schools), was the proposal to include in the bill a provision authorizing judicial review of constitutional issues. The National Council of Churches, because of the concluding sentence of its resolution quoted above, was urged to support an amendment for judicial review.

The National Council did not support such an amendment because its officers were persuaded that there was "adequate provision for judicial review" already in the bill. They were persuaded of this partly by a statement delivered by Rep. Emanuel Celler, Chairman of the House Judiciary Committee, that, "There is no aspect of this bill which raises issues of any significance in the field of church and state that will not be subject to judicial review" (*Congressional Record,* March 26, 1965, pp. 5929-5930).

Having recorded support of this view, the National Council of Churches now feels it has a responsibility to urge this Court to hear the appeals of those citizens who believe their rights under the First Amendment of the Constitution have been infringed by this Act or under color of its authority.

Statute Involved

The statutory provisions involved in this suit are Titles I and II of the Elementary and Secondary Education Act of 1965.

The Question Presented

Do citizens and taxpayers of the United States have standing to challenge in the federal courts an expenditure of federal funds on the ground that it is in violation of the Establishment and Free Exercise provisions of the First Amendment to the United States Constitution?

Statement of the Case

This action was brought by a group of individuals, citizens and taxpayers of the United States and residents of the City and State of New York, challenging the constitutionality under the First Amendment of certain expenditures made by the Department of Health, Education and Welfare. The complaint alleges that these expenditures, purportedly made pursuant to the authority of the Elementary and Secondary Education Act of 1965, were made to finance the furnishing of instruction and the providing of instructional materials for use in religious and sectarian schools. The plaintiffs requested judgment declaring these expenditures to be unconstitutional and enjoining further expenditures for these purposes. No request was made for judgment requiring restitution for funds already expended or which will have been expended before issuance of the injunction sought in the action.

The District Court dismissed the complaint on the single ground that by reason of *Frothingham* v. *Mellon*, 262 U. S. 447 (1923), the plaintiffs had no standing to bring the action, that there was thus no justiciable controversy

and that the court therefore lacked jurisdiction of the subject matter. The court rejected the plaintiffs' contentions that *Frothingham* was not based upon absence of constitutional jurisdiction but upon judicial policy and that the policy considerations which required dismissal in *Frothingham* were inapplicable to a suit based upon the First Amendment. Although conceding that *Frothingham* has been subject to criticism, the court held that it had never been overruled or limited by this Court and that accordingly its authority was unimpaired.

The Question Presented is Substantial

1. The question of standing to sue presented by this appeal is of major significance because it controls the possibility of judicial review under the Establishment Clause of present and future federal expenditures in support of religious institutions. Widely proclaimed as embodying a solution to a difficult problem of church and state,[1] the Elementary and Secondary Education Act of 1965 is just one of many federal programs in the fields of health, education, and welfare that involve federal grants to church-related institutions.

A recent survey conducted by a unit of the United States Senate revealed that in 1966 there were 35 "major programs in education, extending from the preschool to the graduate level, which incorporate church schools into the Federal education scheme."[2] The same study revealed

1. See N.Y. Times, Jan. 27, 1965, at 14, col. 1; N.Y. Times, Jan. 30, 1965, at 8, col. 2.

2. Rept. by the Standing Subcommittee on Constitutional Rights of the Committee of the Judiciary, Sen. Rept. No. 473, 90th Cong., 1st Sess. (Aug. 2, 1967), p. 9.

that the Department of Health, Education and Welfare in 1966 managed 24 programs in the Public Health Service, 13 programs in the fields of research training, information services, construction grants, and workshop assistance, and 11 programs in the welfare field which "benefit religious institutions directly or indirectly."[3]

In light of the proliferation of federal programs with provisions authorizing aid to church-related bodies, it is a matter of central importance to the meaning and indeed the viability of the Establishment Clause to assure judicial review of expenditures under federal programs such as the Elementary and Secondary Education Act. A contrary result will immunize such programs from constitutional scrutiny although there is grave doubt about their validity under decisions of this Court. Surely, if it remains true that "No tax in any amount, large or small can be levied to support any religious activities or institutions," *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947), and if it is necessary to resist "the first experiment on our liberties," *Abington School District* v. *Schemp*, 374 U. S. 203, 225 (1963), the expenditures which benefit church schools under the Education Act are highly questionable expenditures. But it is not essential to the importance of the question raised here that the grants under the Education Act are of dubious validity. The Government has conceded that its position on standing would be identical no matter how clear the breach of the First Amendment.[4] Accordingly, judicial review would be precluded under the deci-

3. *Id.* at 9-10.

4. See the dissenting opinion of Judge Frankel, Jurisdictional Statement, p. 20.

sion below even if the breach in the First Amendment wall was obvious, if, for example, government funds were used "to pay the salary of clerics, to support existing religious structures, etc."[5] Whether our constitutional scheme countenances this is an issue, we suggest, of plain importance.

2. The plaintiffs in this case, as bona fide taxpayers, represent precisely the interest which the Establishment Clause was designed to protect. It is familiar history that a prime purpose of the Clause is to ban the use of public moneys—exacted from individual taxpayers—to support the institutions of any religion or all religions. Thus, "support" by the use of taxpayers' money was at the root of the concern by Jefferson and Madison that resulted in the drafting of the Clause.[6]

The chief reason for this concern is not far to seek and is as valid today as when the Bill of Rights was promulgated. As this Court said in *Engel* v. *Vitale*, 370 U. S. 421, 430 (1962):

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

Such coercion inevitably accompanies a requirement that a taxpayer support a nominally secular program undertaken and controlled by a religious institution not respon-

5. *Id.* at 20 n. 4.

6. See *Everson* v. *Board of Education*, 330 U. S. 1, 11-13 (1947).

sible to public authority. This is exactly the complaint of the plaintiffs here with respect to the Education Act.[7]

The importance attributed to this value is reflected not only in the Establishment Clause itself, but in the numerous and solemn statements by the Framers of the Constitution and by this Court that even trivial exactions are not to be tolerated and the "slightest breach" resisted. See *Everson* v. *Board of Education, supra,* 330 U. S. at 18.

The taxpayer-citizens in this case are the victims of two kinds of coercion: as taxpayers they are forced to support educational programs at church-related schools, and as citizens they are subjected to the "indirect coercive • • • pressure to conform", *Engel* v. *Vitale, supra,* 370 U. S. at 430, implicit in governmental aid to religious institutions. They are, therefore, the logical and historically justified representatives of the public in challenging the expenditures under the Education Act. They likewise are persons who have suffered legal injury under long familiar notions of standing applied in a wide variety of cases, many of which did not involve the special considerations pertinent to litigation under the First Amendment.[8]

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7. It might be added that other important values underlying the Establishment Clause will be sacrificed if judicial review is denied. Perhaps most vital is the ideal that government will not, through the power of the purse, be in a position to interfere with the autonomy and independence of religious groups and, conversely, that such church groups, will not be jockeying for influence in government circles. See *Everson* v. *Board of Education,* 330 U. S. 1, 59 (1946) (Rutledge J. dissenting); Pfeffer, *Church, State, and Freedom,* 135-139 (1967).

8. See, *e.g., Chicago* v. *Atchison, T. & S.F. R. Co.,* 357 U. S. 77, 83-84 (1958); *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U. S. 4, 14 (1942); see also *Dombrowski* v. *Pfister,* 380 U. S. 479, 486 (1965); *Bantam Books* v. *Sullivan,* 372 U. S. 58, 64-65 n.6 (1963).

3. *Frothingham* v. *Mellon,* 262 U. S. 447 (1923), on which a majority of the Court below relied to dismiss this action is plainly distinguishable from the present case. Accordingly, a substantial question is presented as to the applicability of that decision to the deprivation of constitutional rights alleged here.

Mrs. Frothingham's challenge to the Maternity Act of 1921 was premised on the assumption that a taxpayer had standing, on that ground alone, to challenge any federal expenditure. She did not and could not assert a special impact on her or on any right of hers that was protected by the Constitution. For reasons stated above, and developed more fully in Part II of the comprehensive dissenting opinion below by Judge Marvin Frankel, the gravamen of the complaint in this case is a violation of the guarantee embodied in the Establishment Clause that citizens are to be free of any "tax in any amount, large or small, * * * levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson* v. *Board of Education, supra,* 330 U. S. at 16. Therefore, even apart from the fact that the "supremely precious" rights at stake under the First Amendment, *NAACP* v. *Button,* 371 U. S. 415, 433 (1963), may require an "exception to the usual rules governing standing," *Dombrowski* v. *Pfister, supra,* 380 U. S. at 486, the interest advanced here has a more substantial claim on this Court's jurisdiction than the complaint filed by Mrs. Frothingham.

This conclusion is strongly buttressed by the opinions of respected authorities, who have recognized the vital dis-

tinction between the roving commission claimed by Mrs. Frothingham and the claim asserted here, which is grounded in specific constitutional language and validated by history and judicial precedent.[9] This distinction, moreover, is consistent with the assumption of jurisdiction in *Everson* v. *Board of Education, supra.* Finally, the reference by the Court below to the recent decision of this Court in *Abbott Laboratories* v. *Gardner,* 387 U. S. 136 (1967), is wholly misplaced. While endorsing the *Frothingham* case *on its own facts,* this Court recognized that an additional interest of a litigant—such as that claimed under the Establishment Clause here—is sufficient to sustain judicial review.

For these reasons, the Court should not permit the *Frothingham* decision to govern the present case without according the issue of justiciability plenary consideration.

Respectfully submitted,

NORMAN DORSEN
New York University School of Law
40 Washington Square South
New York, New York 10003
Attorney for Amicus Curiae

Of Counsel:
CHARLES H. TUTTLE
One Chase Manhattan Plaza
New York, New York 10005

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9. See Jaffe, *Standing to Secure Judicial Review: Public Actions,* 74 Harv. L. Rev. 1265, 1312 (1960); Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 Harv. L. Rev., 255, 302-305 (1961); Davis, 3 *Administrative Law Treatise* 244 (1958).